

(2)

No. 89-663

Supreme Court, U.S.

FILED

NOV 21 1989

JOSEPH F. SPANIOLO, JR.
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1989

MARY MAYER,

Petitioner,

-against-

CHESAPEAKE INSURANCE COMPANY LIMITED, DWG
CORPORATION, NVF COMPANY, NATIONAL PROPANE
CORPORATION, APL CORPORATION, CHESAPEAKE FINANCIAL
CORPORATION, SOUTHEASTERN PUBLIC SERVICE COMPANY,
VICTOR POSNER, PEABODY INTERNATIONAL CORPORATION,
THE PULLMAN COMPANY, and PTC ACQUISITION, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

COLLEEN MCMAHON
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

Counsel of Record for
Respondents

1989



Questions Presented

1. Should the Court, in the absence of any conflict between circuits, abandon the so-called "direct pecuniary benefit" rule that has long been used to determine beneficial ownership under § 16(b) of the Securities and Exchange Act of 1934?
2. Should the Court review the affirmed factual finding that no respondent received any direct pecuniary benefit from transactions in stock owned by any other respondent?
3. Should the Court review the affirmed factual finding that \$4.6 million of a \$5.6 million payment was paid in consideration for the settlement of litigation and a five-year standstill agreement?

Supreme Court Rule 28.1 List

Pursuant to Supreme Court Rule 28.1, respondents APL Corporation and NVF Company state that their corporate parents may be deemed to be Security Management Corp. and Victor Posner, and respondents Southeastern Public Service Company, Chesapeake Insurance Company Limited, Chesapeake Financial Corporation and National Propane Corporation state that their corporate parent may be deemed to be respondent DWG Corporation, and that in turn their corporate parents may be deemed to be Security Management Corp. and Victor Posner. Security Management Corp. and Victor Posner may also be deemed to control Salem Corporation and Pennsylvania Engineering Corporation; its 91% owned subsidiary, Birdboro Corporation and Fischbach Corporation may be deemed to be controlled by APL Corporation. In addition, Wilson Brothers may be deemed to be controlled by DWG Corporation.

This brief is submitted only on behalf of respondents Chesapeake Insurance Company Limited, DWG Corporation, NVF Company, National Propane Corporation, APL Corporation, Chesapeake Financial Corporation, Southeastern Public Service Company, and Victor Posner.

TABLE OF CONTENTS

	Page
Questions Presented	i
Supreme Court Rule 28.1 List	ii
Table of Authorities	iv
Preliminary Statement	1
Statement of the Case	3
Proceedings Below	5
District Court Decision	5
Court of Appeals Decision	7
Reasons for Denying the Writ	8
THIS CASE PRESENTS NO QUESTION OF GENERAL IMPORTANCE WARRANTING REVIEW BY THIS COURT	8
I. The Second Circuit's Invocation of the "Direct Pecuniary Benefit" Rule is Consistent With All Rele- vant Authority	8
II. Petitioner's "Form Over Substance" Argument is a Disguised Request for Review of Findings of Fact	12
Conclusion	13

TABLE OF AUTHORITIES

Cases:	Page
<i>Berenyi v. District Director, Immigration and Naturalization Service</i> , 385 U.S. 630 (1967)	12
<i>Blau v. Lehman</i> , 368 U.S. 403 (1962)	8
<i>Blau v. Mission Corp.</i> , 212 F.2d 77 (2d Cir.), cert. denied, 347 U.S. 1016 (1954)	11, 12
<i>Branti v. Finkel</i> , 445 U.S. 507 (1980)	12
<i>CBI Industries, Inc. v. Horton</i> , 682 F.2d 643 (7th Cir. 1982)	8
<i>Herrmann v. Steinberg</i> , 812 F.2d 63, 67 n.5 (2d Cir. 1987)	6
<i>Heublein, Inc. v. General Cinema Corp.</i> , 559 F. Supp. 692 (S.D.N.Y.), aff'd, 722 F.2d 29 (2d Cir. 1983), cert. denied, 465 U.S. 1066 (1984)	8
<i>Layne & Bowler Corp. v. Western Well Works, Inc.</i> , 261 U.S. 387 (1923)	10
<i>Margolies v. Rea Bros.</i> , [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,261 (S.D.N.Y. 1983)	8
<i>Rogers v. Lodge</i> , 458 U.S. 613 (1982)	12
<i>Whiting v. Dow Chemical Co.</i> , 523 F.2d 680 (2d Cir. 1975)	8
<i>Whittaker v. Whittaker Corp.</i> , 639 F.2d 516 (9th Cir.), cert. denied, 454 U.S. 1031 (1981)	10-12

Statutes:	Page
Federal Rule of Civil Procedure 52(a)	5
Securities and Exchange Act of 1934, Section 13(d), 15 U.S.C. § 78m(d)	2, 3
Securities and Exchange Act of 1934, Section 16(a), 15 U.S.C. § 78p(a)	2
Securities and Exchange Act of 1934, Section 16(b), 15 U.S.C. § 78p(b)	2, 3, 6-10
Supreme Court Rule 17	11
Other Authorities:	
Exchange Act Release No. 34-1965 [Permanent Binder 4] Fed. Sec. L. Rep. (CCH) ¶ 26,041 (December 21, 1938)	9
Exchange Act Release No. 26333 [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,343 (December 2, 1988)	9, 10

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1989

MARY MAYER,

Petitioner,

-against-

CHESAPEAKE INSURANCE COMPANY LIMITED,
DWG CORPORATION, NVF COMPANY, NATIONAL
PROPANE CORPORATION, APL CORPORATION,
CHESAPEAKE FINANCIAL CORPORATION,
SOUTHEASTERN PUBLIC SERVICE COMPANY,
VICTOR POSNER, PEABODY INTERNATIONAL
CORPORATION, THE PULLMAN COMPANY,
and PTC ACQUISITION, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Preliminary Statement

Applying a settled rule of law to an almost entirely stipulated record, the United States District Court for the Southern District of New

York (Keenan, J.) ruled in this case that stock in Peabody International Corporation ("Peabody") owned by four separate corporations could not be aggregated in order to turn one of those corporations into a statutory "insider" under § 16(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78p(b). ^{1/} The Second Circuit, by a 2-1 majority, held that this determination was not erroneous. The question presented by the instant petition is straightforward: Should that essentially factual finding be reviewed in this Court? The question, respondents submit, answers itself.

This case raises no novel or significant issue of law. It has long been settled that Person A will not be deemed the beneficial owner of stock owned by Person B for purposes of ascertaining statutory insider status — even if Persons A and B are somehow related — unless Person A receives some direct pecuniary benefit from the sale of Person B's stock. Thus, the holdings of two or more related persons who own stock in the same company may not be aggregated for purposes of determining who is a 10% statutory "insider" unless each person shares directly in the proceeds from the sale of stock owned by the others. This is true even if those same persons would be deemed "beneficial owners" of each other's stock for purposes of those sections of the Exchange Act that impose reporting requirements on so-called "groups," such as §§ 16(a) and 13(d).

The Second Circuit applied this long-standing rule when it refused to attribute to respondent APL Corporation beneficial ownership of Peabody common stock belonging to other respondents, even though all the respondent corporations had the same Chairman of the Board, and were therefore a § 13(d) "group." As a result, APL was only required to disgorge short-swing profits on 290,100 of the 1,421,800 Peabody shares it owned. Had APL been deemed the

^{1/} Section 16(a) defines a statutory insider as one who is "directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security [of the issuer, or who is] a director or an officer of the issuer of such security." 15 U.S.C. § 78p(a).

beneficial owner of the Peabody stock belonging to its co-respondents, it would have had to disgorge the profit on all 1,421,800 shares.

Review of the Second Circuit's decision would be inappropriate. All the circuits agree that related parties must receive direct pecuniary benefit from the sale of subject shares in order to be deemed beneficial owners of those shares for § 16(b) purposes. Whether APL and its co-respondents, including Victor Posner, received direct pecuniary benefit from each other's stock transactions is a question of fact that is beyond this Court's province to review.

The petition should be denied.

Statement of the Case

This case grew out of the long and often acrimonious relationship between Peabody International Corporation, its four principal stockholders (respondents Chesapeake Insurance Company, DWG Corporation, National Propane Corporation, and APL Corporation) and Victor Posner, who served as Chairman of the respondent companies.

Between 1981 and 1983, Chesapeake, DWG and National Propane each purchased Peabody common stock. All three purchasers were substantial companies, engaged in substantial businesses, employing thousands of people at dozens of locations throughout the country. DWG was a publicly traded company with thousands of stockholders; Chesapeake and National Propane were operating subsidiaries of public companies whose shares were also widely held.

By November 1983, the three companies' combined holdings equalled about 23% of Peabody's outstanding common stock. Because Victor Posner was Chairman of all three companies, they reported their holdings as a "group" under § 13(d) of the Securities and Exchange Act of 1934. At all times, each of the three companies disclaimed beneficial ownership of each other's shares.

Despite their substantial holdings, none of these defendants nor anyone affiliated with them had any representation in Peabody's man-

agement or on its Board. Nonetheless, two years after the last purchase of Peabody stock by respondents, on June 19, 1985, Peabody entered into a defensive merger agreement with a "white knight," the Pullman Company. This "lock-up" agreement effectively diluted the interest of the Chesapeake-DWG-National Propane group, and gave Pullman a *de facto* veto over any competing takeover proposal.

Once the lock-up was in place, Pullman's President, Thomas Begel, tried to win Posner's support for the proposed merger. In July and August 1985, Begel offered, both orally and in writing, to pay the shareholder corporations as much as \$4 million for a standstill agreement under which Chesapeake, DWG and National Propane would refrain from increasing their interest in Peabody and would vote for the merger. Begel's proposal did not contemplate that the three corporations would sell their Peabody stock in exchange for accepting this payment. Posner, acting on behalf of the three corporations, declined Begel's offers.

Between August 7 and September 19, APL (another public company chaired by Victor Posner) purchased 1,421,800 shares of Peabody common stock, or 12.5% of the company's outstanding shares. APL's holdings rose above 10% of Peabody's stock on August 23; it purchased 290,100 shares thereafter.

On August 27, Peabody and Pullman entered into two additional "defensive" agreements that had the effect of preventing Chesapeake, DWG, National Propane and APL from voting either for or against the proposed merger. Lawsuits among Peabody, Pullman and various of the respondents were already pending in Connecticut and Florida, and respondents announced their intention to oppose the proposed Peabody-Pullman merger and to challenge the lock-ups in court.

Ultimately, the parties settled. On September 20, Peabody, Pullman and respondents entered into an agreement under which Peabody and Pullman agreed to pay \$5.6 million for (1) a settlement of all pending litigation, and (2) a five year standstill that barred the four stockholder corporations, Posner, and anyone affiliated with them from

threatening the Peabody-Pullman merger or from acquiring any stock in the merged entity. These terms were substantially similar to those Begel had offered some weeks earlier in exchange for a \$4 million payment.

Each of the four companies that had invested in Peabody realized income from the settlement fund in proportion to its ownership of Peabody stock. As petitioner stipulated, none of the other respondents, including Victor Posner, received any proceeds from the settlement.

On the same day that the settlement and standstill agreement was signed, the four stockholding companies sold their Peabody shares to thirteen unaffiliated third-party purchasers. Each of the four selling respondents received the entire proceeds from the sale of the shares it owned; no other respondent shared in those proceeds.

Proceedings Below

Petitioner Mayer commenced this derivative action on October 9, 1985. She alleged that the \$5.6 million paid under the September 20 agreement was actually consideration for the sale of the stockholders-respondents' Peabody shares, and that the agreement was a sham and a subterfuge designed to hide the fact. Mayer also contended that, in determining beneficial ownership for purposes of ascertaining when APL became a 10% holder of Peabody stock, the stock owned by Chesapeake, DWG and National Propane should be beneficially attributed to APL. If this were done, then APL was already a statutory insider when it began purchasing Peabody stock for its own account, and the profit on all of APL's 1,421,800 Peabody shares, not just the last 290,100 purchased, would have been subject to disgorgement.

District Court Decision

On October 11, 1988, after a bench trial (at which nearly all the relevant facts were stipulated), the district court issued Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(a). The

district court found that the standstill and settlement agreement was not a sham, but rather that it conferred significant independent benefits on Peabody and Pullman by ending formidable opposition to their merger, terminating two lawsuits, and preventing respondents from taking a position in the merged company. (A. 9-10) 2/ Expressly rejecting the testimony of plaintiff's so-called "expert" (A. 6), the district court further found that \$4.6 million of the \$5.6 million settlement was paid in consideration for those benefits. (A. 10)

The court also found that the respondents could not be deemed to be the beneficial owner of each other's shares for § 16(b) purposes. (A. 9) The district court judge applied the so-called "direct pecuniary benefit" rule, which states that a party who is not the actual owner of stock cannot be deemed the § 16(b) beneficial owner of those shares unless he receives some direct pecuniary benefit from the actual owner's transactions in the subject stock. (A. 9) Since the evidence established that no respondent derived any direct pecuniary benefit from the sale of Peabody shares owned by any other respondent, APL — the only respondent which bought and sold Peabody stock within six months — was not already the beneficial owner of more than 10% of Peabody's stock when it began purchasing Peabody shares in August 1985. (A. 9) It did not become a statutory insider for § 16(b) purposes until August 23, when it purchased enough stock for its own account to cross the 10% threshold. (A. 10) Thus, only the profit on the 290,100 shares APL purchased after that date was subject to disgorgement. (A. 10-11)

In calculating the disgorgeable amount, the district court did not "offset losses against gains," as alleged in the petition. It applied the formula outlined by the Second Circuit in *Herrmann v. Steinberg*, 812 F.2d 63, 67 n.5 (2d Cir. 1987), a § 16(b) case involving almost identical facts. It concluded that APL's short-swing profits on the sale of its 290,100 short-swing shares amounted to \$4,858.50. (A. 10-11)

2/ Appendix references are to the petition appendix.

On October 31, 1988, the district court entered final judgment against APL in the amount of \$5,980.80 (\$4,858.50 plus interest) and dismissed the complaint as against the other respondents. (A. 11)

Court of Appeals Decision

On appeal, the Second Circuit affirmed. The majority (Kearse and Winter, JJ.) affirmed that direct pecuniary benefit was the appropriate test of beneficial ownership in this § 16(b) case. (A. 24-27) The majority recognized that a non-owning party could receive a direct pecuniary benefit from the sale of another's stock in several circumstances, including (1) where the non-owning party has "absolute control over a subsidiary that owns the stock," (A. 21), (2) where the non-owner "has absolute control over the transactions *and* directly benefits from the profits" (A. 23) (emphasis added), or (3) where the non-owner "shared benefits substantially equivalent to ownership." (A. 24) But it found no error in the district court's application of the facts to these tests, or in its conclusion that no respondent received any direct pecuniary benefit from the sale of any other respondent's Peabody stock. (A. 27-29) In particular, the majority affirmed the district court's finding that Victor Posner received no direct pecuniary benefit. (A. 28-29)

In dissent, Judge Sweet indicated that because Posner could control the decision to acquire or dispose of Peabody stock by the four companies, they should be treated as a single beneficial owner of each other's shares, whether or not Posner received any direct pecuniary benefit from the sale of any respondent's Peabody stock. (A. 39)

The entire panel agreed that the district court had not clearly erred in finding as a matter of fact that the standstill agreement conferred value of \$4.6 million on Peabody and Pullman. (A. 33-35, 40)

Reasons For Denying the Writ

THIS CASE PRESENTS NO QUESTION OF GENERAL IMPORTANCE WARRANTING REVIEW BY THIS COURT

I. The Second Circuit's Invocation of The "Direct Pecuniary Benefit" Rule is Consistent With All Relevant Authority

Petitioner contends that the Second Circuit has adopted a novel construction of § 16(b) beneficial ownership in this case. However, it is petitioner's argument, not the decision below, that conflicts with all pertinent authorities.

The direct pecuniary benefit test of § 16(b) beneficial ownership is a rule of long standing. Over a quarter-century ago, in *Blau v. Lehman*, 368 U.S. 403, 414 (1962), Justice Black recognized that a § 16(b) insider must disgorge only profits "realized by him," not by some affiliated party. This standard has been reaffirmed in an unbroken line of cases, all of which hold that a party who does not actually purchase and sell stock within six months while a statutory insider is not the beneficial owner of those shares for § 16(b) purposes unless some direct pecuniary benefit from the transaction flows to him. *E.g.*, *CBI Industries, Inc. v. Horton*, 682 F.2d 643, 646 (7th Cir. 1982); *Whiting v. Dow Chemical Co.*, 523 F.2d 680, 688 (2d Cir. 1975); *Margolies v. Rea Bros.*, [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,261, at 96,179 (S.D.N.Y. 1983).

The direct pecuniary benefit rule has been strictly construed; it applies even if the non-trading party is so related to the trading party that he would be deemed the "beneficial owner" of those same shares for the purposes of other sections of the Exchange Act, such as those that impose reporting requirements on members of a corporate control "group." *Whiting, supra*, 523 F.2d at 685 n.8; *Heublein, Inc. v. Gen-*

eral Cinema Corp., 559 F. Supp. 692, 705 (S.D.N.Y.), *aff'd*, 722 F.2d 29 (2d Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984).

Petitioner contends that the direct pecuniary benefit rule is at odds with the SEC's interpretation of the term "beneficial ownership" for § 16(b) purposes. As the Second Circuit recognized, petitioner is wrong. In 1938, the SEC's General Counsel opined that a non-owning party could be deemed the "beneficial owner" of stock belonging to someone else for § 16(b) purposes only where the non-owner could use the actual owner of stock as a "personal trading or investment medium," and where the actual owner of the subject stock "has no other substantial business." Exchange Act Release No. 34-1965 [Permanent Binder 4] Fed. Sec. L. Rep. (CCH) ¶ 26,041, at 19,060 (December 21, 1938). A personal trading or investment medium that has no other business necessarily yields direct pecuniary benefit to the person who controls it. This is but another way of describing the direct pecuniary benefit rule.

The lower courts here ruled as a matter of fact that the evidence before them did not support any inference that the respondent corporations were Victor Posner's personal trading or investment companies or that they had no other substantial business. Hence, under the SEC's traditional interpretation of § 16(b) "beneficial ownership," respondents could not be deemed beneficial owners of each other's stock.

Last December — over three years after the events that are the subject of this action took place — the SEC announced a proposed rule that would change the definition of "beneficial ownership" under § 16(b) for the purpose of ascertaining who is a 10% owner of subject stock. This proposed new definition would permit a finding of beneficial ownership even when a non-owning party did not receive any direct pecuniary benefit from the subject stock transaction, as long as the non-owner had sufficient "potential for control" over the owner. Exchange Act Release No. 26333 [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,343, at 89,603 (December 2, 1988). In an-

nouncing this proposed rule, the SEC specifically noted that its proposed definition of § 16(b) beneficial ownership “would go beyond most of the judicial decisions and state that some indirect pecuniary interest is sufficient to convey beneficial ownership.” (*Id.* at n.57). Thus, the SEC has explicitly acknowledged that the law applied by the Second Circuit in this case — the direct pecuniary benefit rule — was the law at the time of the transactions at issue.

Petitioner urged the lower courts to adopt the SEC’s as yet unadopted rule retrospectively and to apply it to a case that arose three years before the proposed rule was announced. Both courts quite properly declined to do so. 3/

In light of the SEC’s proposal to change the interpretation of the term “beneficial ownership,” this case hardly presents any issue of public importance. Review by this Court would not provide guidance to the lower courts for future cases. Rather, it would interpret a rule that soon may be no longer in effect — making the question important only to this particular case and not generally. Such an issue is not worthy of certiorari. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (Supreme Court decides only issues of public importance).

Petitioner’s argument that the Second Circuit’s decision raises a conflict between the circuits also has no merit. *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir.), *cert denied*, 454 U.S. 1031 (1981), the allegedly conflicting decision, is in fact consistent with the Second Circuit’s ruling.

As the majority below recognized, *Whittaker* applied the very same direct pecuniary benefit test that was relied on in this case. The Ninth Circuit reached a different result — it held the non-owner liable

3/ The error in the dissent, respondents submit, was that Judge Sweet relied heavily on this proposed SEC rule, without acknowledging (as the SEC itself had) that this new interpretation was contrary to the law that existed at the time the events in this case took place.

for disgorgement — but only because the facts in *Whittaker* were very different than those at bar. In *Whittaker*, the non-owning party — the son of the actual shareholder — exercised virtually complete control over his mother's affairs and had the unfettered ability to use for his personal account the profits from transactions in the stock owned by his mother. *Id.* at 524. Thus, the Ninth Circuit could fairly conclude as a matter of fact that the profits inuring to the account of the mother afforded direct pecuniary benefit to the son.

In this case, the district court made precisely the opposite finding — that neither Victor Posner nor any of the other so-called “Posner defendants” had the ability to commingle APL's funds with those of other corporations or to use the proceeds of its stock transactions for their own account. That finding was not deemed clearly erroneous by the Second Circuit; it is unassailable here.

Petitioner also suggests that the Court of Appeals' ruling is at odds with an earlier Second Circuit decision, *Blau v. Mission Corp.*, 212 F.2d 77 (2d Cir.), *cert. denied*, 347 U.S. 1016 (1954). Putting to one side the question of whether an alleged intra-circuit conflict, as opposed to inter-circuit conflict, is ripe for review by this Court, ^{4/} the Court of Appeals majority quite properly recognized that there was a fundamental factual distinction between *Mission* and this case. In *Mission*, the issue was whether a majority shareholder, who had absolute control over a non-diversified, closed-ended management company (which fits precisely within the definition of a “personal trading or investment medium”) could be deemed the beneficial owner of shares owned by that management company. In this case, the issue was whether Victor Posner, as Chairman of public companies with numerous shareholders and substantial operating businesses, so completely controlled those companies that he could share directly in the proceeds of stock transactions made by the companies.

^{4/} Supreme Court Rule 17 states that the Court will consider granting certiorari in a case where there is a conflict between one federal court of appeals and another, not in a case of intra-circuit conflict.

In the end, the distinction among cases like *Whittaker* and the case at bar lies in their facts. The courts all applied the direct pecuniary benefit rule; they reached different results because, for example, in *Mission* and *Whittaker*, the facts revealed that the non-owning party received a direct pecuniary benefit, while in this case the facts revealed otherwise. This distinction only underscores why it would be improper to grant the petition here.

**II. Petitioner's "Form Over
Substance" Argument is a
Disguised Request for
Review of Findings of Fact.**

Petitioner asks this Court to grant certiorari to review the finding that \$4.6 million of the \$5.6 million payment from Pullman to respondents was made in exchange for the benefits conferred by the standstill and settlement agreement. (Pet. at 9-12) Petitioner continues to urge that those benefits were worthless and a sham.

However, whether the standstill and settlement covenants had value and, if so, how much, are pure questions of fact. Even the dissenting judge in the Second Circuit recognized that it was "indeed appropriate" for the panel to uphold this purely factual finding, since it was not clearly erroneous. (A. 40) This Court has repeatedly held that it will not review factual determinations in which the district courts and courts of appeals have concurred. *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
 November 21, 1989

Respectfully submitted,

**COLLEEN McMAHON
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000**

**COUNSEL OF RECORD FOR
RESPONDENTS**

